UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

RANDOM ACQUISITIONS, LLC

and

Case 07-CA-052473

SHERRIE CVETNICH, An Individual

Steven E. Carlson, Esq., for the General Counsel. Timothy Hogan, of Milton Florida, for the Respondent.¹

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This supplemental proceeding was held in Grand Rapids, Michigan, on March 6, 2014, pursuant to an amended compliance specification that was issued by the Director for Region Seven of the National Labor Relations Board (Board or NLRB) on April 30, 2013, and a notice of hearing that was issued on December 11, 2013. Previously, on August 2, 2011, the Board issued a Decision and Order, 357 NLRB No. 32 (2011), since enforced by the Court of Appeals for the Sixth Circuit, which required Random Acquisitions, LLC, (the Respondent) to, inter alia, make discriminatees Sherrie Cvetnich, Eric Cvetnich, and Theresa Burge whole for any loss of earnings and benefits resulting from the discrimination against them. The Respondent has made no payments to satisfy its obligation under the Board Order enforced by the Court of Appeals.

On June 29, 2012, the Region issued the initial compliance specification alleging the amount of backpay due to the discriminatees. The Respondent submitted an answer to that compliance specification on July 18, 2012. The General Counsel subsequently filed a motion to transfer the case to the Board and for partial summary judgment, arguing that the Respondent's answer was inadequate. The Board issued an order transferring the proceeding to the Board and a notice to show cause why the General Counsel's motion should not be granted. The Respondent did not respond to the motion or the notice to show cause and, on January 28,

¹ On July 18, 2012, an attorney who had previously communicated with the Region on behalf of the Respondent filed a "notice of non-appearance" advising the Board that the Respondent had not retained her and that all future communications by the Board "in this matter should be directly with the Respondent through its Managing Member Timothy Hogan." Hogan filed an answer to the initial compliance specification, but neither he, nor anyone else representing the Respondent, chose to participate at the hearing or file a post-hearing brief.

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2013, the Board issued a decision in which it ordered that the gross backpay allegations of the specification be deemed as true since the Respondent had failed to deny them. 359 NLRB No. 55 (2013). The Board stated that the effect of its ruling was "that the Respondent is precluded, in any subsequent compliance hearing, from disputing any of the factors entering into the gross backpay computations, including the duration of the backpay period from October 16, 2009 to June 23, 2012." Id. at fn. 6. The Board remanded the case to the Region for the purpose of holding a hearing before an administrative law judge that would be "limited to taking evidence concerning the amounts of interim earnings and net backpay involved in paragraphs 6 and 7 [of the compliance specification] and to the remaining paragraphs of the compliance specification as to which summary judgment was not granted." 359 NLRB No. 55 (2013).

Subsequent to the Board's January 28 decision, the Region issued an amended compliance specification dated April 30, 2013. The Respondent filed no answer and the General Counsel filed a motion asking the Board to grant default judgment. Again the Board issued a notice to show cause why the motion should not be granted, and again the Respondent filed no response. On September 16, 2013, the Board issued a second supplemental decision holding that although the Respondent had not answered the amended compliance specification, the denials in its answer to the initial specification were still effective since the allegations in the amended specification were not substantively different from those in the initial specification. The Board remanded the case to the Region for a hearing before an administrative law judge "for the limited purpose of taking evidence to determine the amounts of interim earnings and net backpay involved in paragraphs 6 and 7 and to the remaining paragraphs of the amended compliance specification as to which summary judgment was not granted in the Board's earlier supplemental decision." 360 NLRB No. 1 (2013). The Board noted that if the Respondent failed to participate in that hearing "nothing herein will prevent the administrative law judge from granting a motion for summary judgment at that time." Id. at fn. 7.

On December 11, 2013, the Regional office issued, and served the Respondent with, notice that the hearing contemplated by the Board's September 16 Order would be held on March 6, 2014. The Respondent did not appear at the time and place set forth in the notice of hearing. Counsel for the General Counsel stated, on the record, that the Respondent had not contacted him to seek to reschedule or postpone the hearing. I have not received any such communication from the Respondent. I adjourned the hearing for a period of 1 hour to give the Respondent additional time to appear for the hearing, but the Respondent still did not appear or communicate with the General Counsel or myself. After the hour had passed, and after the General Counsel described what I find were sufficient efforts to include the Respondent in the hearing, I proceeded with the hearing and the General Counsel submitted its evidence regarding the amended compliance specification. See *Beta Steel Corporation*, 326 NLRB 1267 fn. 3 (1998), enfd. 210 F.3d 374 (7th Cir. 2000) (Table).

DISCUSSION

The amended compliance specification sets forth the amounts of backpay that the General Counsel alleges the Respondent owes to discriminatees S. Cvetnich, E. Cvetnich, and Burge, for the backpay period that the Board has already approved – that is, from October 16, 2009, to June 23, 2012. The Board, in a prior decision in this case, ruled that the gross backpay calculated by the Region, including "any of the factors entering into the gross backpay computations," are established and may not be contested in the proceedings before me. Therefore, the General Counsel has established the gross backpay amounts for the discriminatees and, under Board precedent, the burden shifts to the Respondent to establish interim earnings or any other facts that negate or mitigate its liability. *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995); *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993); *Mastro*

Plastics Corp., 136 NLRB 1342, 1346 (1962). At the hearing conducted on March 6, 2014, pursuant to the Board's September 16, 2013, Order, the Respondent had the opportunity to present evidence regarding interim earnings and any other facts that might justify deductions from gross backpay, but the Respondent did not appear at the hearing or otherwise avail itself of that opportunity. The record before me does not include any basis for concluding that amounts should be deducted from backpay beyond the interim earnings that the Regional Director has already included in the amended compliance specification issued on April 30, 2013.² Based on my review of the amended compliance specification, I find that the Region properly calculated the net backpay due to each discriminatee. The amount of net backpay that the General Counsel has calculated for S. Cvetnich is \$46,576.64, for E. Cvetnich is \$29,894.27, and for Burge is \$48,795.00. The General Counsel has established that those amounts are due to the discriminatees for the period from October 16, 2009, to June 23, 2012. On the basis of the above, I issue the following recommended Order.³

15 ORDER

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The Respondent, its officers, agents, successors, and assigns, shall make whole Sherrie Cvetnich, Eric Cvetnich, and Teresa Burge, for the period from October 16, 2009, to June 23, 2012, by the payment to them of the net backpay amounts set forth below, plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enfd. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

	Gross Backpay	Interim Earnings	Net Backpay
Sherrie Cvetnich	\$51,240.00	\$4,663.36	\$46,576.64
Eric Cvetnich⁴	\$39,680.00	\$9,785.73	\$29,894.27
Teresa Burge	\$51,625.00	\$2,830.00	\$48,795.00

Dated, Washington, D.C. April 8, 2014.

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Paul Bogas Administrative Law Judge

² Although, as stated above, it is the Respondent's burden to establish the discriminatees' interim earnings, the General Counsel's policy is to assist in gathering information on interim earnings and to include that information in the compliance specification as an administrative courtesy. *Florida Tile*, 310 NLRB 609 (1993), enfd. 19 F.3d 36 (11th Cir. 1994) (Table); *Ryder System*, 302 NLRB 608, 613 fn.7 (1991), enfd. 983 F.2d 705 (6th Cir. 1993). The General Counsel has done that here, including its interim earnings information in the compliance specification and making the appropriate deductions to arrive at the net backpay for each discriminatee.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

In some calendar quarters during the backpay period, E. Cvetnich's interim earnings exceeded his gross backpay and, therefore, he is not entitled to net backpay for those quarters. The total gross backpay and interim earnings set forth for E. Cvetnich do not include amounts from those quarters.